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Introduction

Late in the summer of 1988, the rap trio, The Beastie Boys, was set to record their second album, *Paul's Boutique,* with the help of the innovative production team, The Dust Brothers. The Beastie Boys chose The Dust Brothers because the Brothers had developed a reputation for being masters of "sampling," technologically the cutting-edge, funky, and fresh force in rap sound.

The fresh edge of sampling, which entails borrowing exact sounds from earlier recorded works, afforded The Beastie Boys a riveting blend of rap, funk, and psychedelic music. There was only one problem.

Sampled artists from the distant past were stirring. Many were beginning to question the use of their music in these brazen new songs. Were the new artists disrespectfully making fun of them? The Beastie Boys were aware of these rumblings. They turned to their attorney, Ken Anderson, for help. Anderson, fully cognizant of possible copyright violations, asked himself what the sampled artists really wanted. He concluded that those artists, primarily from the '60s and early '70s, wanted respect and recognition most of all. So Anderson, armed with a list that the trio had compiled of some four hundred samples they wanted to use in the recording process, phoned or wrote each sampled artist. He managed to clear each sample, for little or no cost.

Unfortunately, Anderson is the exception and not the rule. Many performers in the music industry do not understand the legal and technical ramifications of the burgeoning new art form of digital sampling. Digital sampling reproduces subsets of an existing sound recording for inclusion into a new sound recording.[1] Once the existing fragment is recorded from analog into digital form,[2] the resulting stream of numbers

1. Essentially, the process involves recycling fragments of sound, usually recorded earlier by other musicians. *See generally* Note, *The Copyright Considerations of a New Technological Use of Musical Performance,* 11 HASTINGS COMM/ENT L.J. 671 (1988) (authored by Jeffrey Newton); *see also* Mathews and Pierce, *The Computer as a Musical Instrument,* SCIENTIFIC AMERICAN, Feb. 1987, at 126. For a concise and graphic explanation of digital sampling, *see* Tomsho, *As Sampling Revolutionizes Recording, Debate Grows Over Aesthetics, Copyrights,* Wall St. J., Nov. 4, 1990, at 1, col. 3.

A sound recording is defined under the Copyright Act as a "work that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which [it is] embodied." 17 U.S.C. § 101 (1988).

Phonorecords are defined as "material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecord' includes any material object in which the sounds are first fixed." *Id.*

2. Analog sound is that sound produced through audio tape media, while digital sound is produced by computer, or stored on a computer chip for recall. Analog sound is captured by

(representing sonic wave form) can be manipulated in an infinite number of ways, altering some parameters like pitch, while leaving others, such as timbre, intact.[3] The process allows the producer to record a voice or an instrument, either live or from a previous sound recording, and to manipulate it with a computer so that it can be played back at any pitch over the range of a keyboard. Thus, digital sampling allows musicians, producers, and equipment manufacturers to "borrow" other artists' signature instrumental or vocal sounds.[4]

This Note addresses the controversy over appropriation of pre-recorded sound in rap, a musical form that combines rhyming with bits and pieces of music "mixed" together to form the layers of a song. Part one introduces and explains the history of rap music, followed by an exploration of the importance of sampling to rap music as well as its postmodern artistic viability. Next, the legal implications of the Federal Copyright Act[5] (hereinafter "Copyright Act") on the process of digital sampling are explored. This part will describe what is protectable under the Copyright Act, as well as what constitutes an infringement of a sound recording copyright. This Note then considers whether digital sampling violates the Copyright Act, despite the fact that the technology was nonexistent at the time the statute was enacted and amended. Further, this Note offers a variety of factors that point to the inappropriateness of litigating digital sampling disputes. Finally, this Note proposes to resolve the sampling problem through the application of an industry-wide licensing scheme that retains enough flexibility to be specific to each situation that may arise.

I
History of Rap Music

Rap music existed in practice in the Bronx, New York, many years before it entered the mainstream American music scene as "new black American popular music called 'rap.' "[6] The art form was created when local disc jockeys (DJs) teamed up with "MCs"[7] who provided a show,

the use of magnetic tape, on to which air pressure fluctuations are translated into signals that vary the voltage of the electrical current. Thus the tape is encoded. Alternatively, digital recording expresses wave-forms in binary numbers. Electrical signals are translated proportional to voltage, which is stored in the computer's memory. This method is utilized on compact discs, and in digital sampling. *See* Note, *supra* note 1, at 672-73.

3. Drake, *Digital Sampling: Looming Copyright Problem,* UPI, May 8, 1987 (LEXIS, Nexis library, Omni file).

4. Dupler, *Digital Sampling: Is it Theft?,* BILLBOARD, Aug. 2, 1986, at 1, col. 3.

5. Copyright Act of 1976, 17 U.S.C. §§ 101-914 (1988).

6. D. TOOP, THE RAP ATTACK, AFRICAN JIVE TO NEW YORK HIP-HOP 8 (1984).

7. "MC" is an abbreviation for master of ceremonies.

creating spoken rhymes, catch phrases, and a commentary about the DJ, the clientele, and themselves over the mixed music and drum beats.[8] "Original" sounds were created by "scratching"[9] on a set of two or three turntables.

The music the DJs used in the mid 1970's came from highly obscure and often even secret records.[10] Early on, rappers known as The Force MD's used scratches to incorporate into their mixes not only other artists' music, but also television theme songs such as those from *The Brady Bunch, The Addams Family,* and *F-Troop*. The group took taped snippets from the T.V. shows and added them to their beats and rhymes.[11]

In 1979, rap was revolutionized. Two records were released[12] in which the music appropriated was a remix of Chic's then huge and recognizable disco hit "Good Times" as the backing track.[13] These releases revolutionized rap because they involved the actual usurpation of previously recorded material, in contrast to DJs who simply had been playing the records at various informal gatherings as the MCs rapped over them, without altering the recording. In regard to the informal earlier activity, Afrika Bambatta, then a DJ in the Bronx and now a prominent rap recording artist, said,

> . . . I used to play the weirdest stuff at a party. . . . I would throw a commercial [into the mix] to cool them out, and then I would play 'Honky Tonk Woman' by the Rolling Stones and just keep the beat going. I'd play something from metal rock records like Grand Funk Railroad. 'Inside Looking Out' is just the bass and drumming . . . rrrmmmmmmm . . . and everybody starts freaking out.[14]

8. D. TOOP, *supra* note 6, at 15.

9. Scratching is a technique wherein the DJ manipulates the needle of a record that is playing, creating an audible sensation. It has been referred to as "the endless high speed collaging of musical fragments." *Id.* at 18.

10. *Id.* at 15.

11. *Id.* at 26.

12. There is some debate in the music industry as to which record came first, but the general consensus is that the first record was by a Brooklyn-based group called Fatback and their DJ, Big Tim III, recording on the Spring label. This was followed by the "granddaddy" of rap records, "Rapper's Delight," by The Sugarhill Gang on Sugarhill Records. *Id.* at 15-16.

13. *Id.* at 15-16. The music from the Chic song comprised essentially all the music for the two records discussed *supra* note 12. The "originality" was provided by scratching and other assorted special effects. *Id.* "Sampling has been a natural avenue for rappers since the style began with artists creating their own lyrics to the accompaniment of cassette tapes of songs or skeletal rhythm tracks. In some respects rappers were 'sampling' before the term existed since many early hits in the genre were built around the bass line to 'Good Times' by Chic." Snowden, *Sampling, A Creative Tool or License to Steal?,* L. A. Times, Aug. 6, 1989 (Calendar), at 61, col. 1.

14. D. TOOP, *supra* note 6, at 65-66.

At that point, there was no copyright problem, due to the noncommercial medium in which rap existed.[15] "Rap was a performance medium: It was a throw back to the days when musicians made singles approximating their live shows."[16]

Until 1979, the sole documentation of Bronx hip-hop was cassette tapes. These tapes were either clandestine tapes made by would-be bootleggers at parties or tapes made by groups themselves and distributed to friends.[17] However, as soon as these records were released, a direct conflict arose between this practice and the traditional protections afforded under Copyright Law.[18] As one author comments, "[t]he concurrent fashionability of scratch mixing and sampling keyboards like the Emulator and Fairlight has led to creative pillage on a grand scale and caused a crisis for pre-computer-age concepts of artistic property."[19] Further, the advent of the inexpensive and easy to use sampling keyboards provided rap artists with incredible electronic musical power at their fingertips.[20] It is this environment in which the debate arose over whether sampling through record scratching and tape loops for use on a new recording constituted copyright infringement. The controversy has shaken the legal and musical communities, gaining ever-increasing attention since the technology was first popularized several years ago.[21] The now rou-

15. 17 U.S.C. § 114 operates to limit the penumbra of basic rights afforded the owner of a copyright. Specifically, performance and reproduction rights are limited. Section 114 makes it textually clear that there exists no performance right as such in a sound recording. The user must satisfy license requirements with either Broadcast Music, Inc. or the American Society of Composers, Authors, and Publishers. Both of those artist protection agencies require that a DJ at a club, for example, have a license for the songs that he performs on any given evening. These licenses are obtained easily and for nominal fees, effectively keeping such "performance" outside the realm of copyright law. Thus, recording owners may not sue licensed users for performance that is done for a profit at a nightclub. *See* Goldstein v. California, 412 U.S. 546 (1973); *see also* Capital Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).

The case of Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 (1984), is particularly illustrative of the above distinction between commercial and noncommercial performance, as well as the copyrightability of performance. In *Sony*, the Court had to decide whether making unauthorized videotapes of television shows and motion pictures for the purpose of viewing them at home, at a more convenient time (time shifting), was a copyright infringement. The Court, per Justice Stevens, held that such use was a fair use under 17 U.S.C. § 107, because it was a noncommercial, nonprofit activity that the plaintiff failed to prove would adversely affect the potential market for the copyrighted work. *Id.* at 793-95. By analogy, Bambatta's use of a song by the Rolling Stones at a party could hardly be said to detract from the commercial value of the copyrighted song.

16. D. TOOP, *supra* note 6, at 93.

17. *Id.* at 78.

18. Copyright Act of 1976, 17 U.S.C. §§ 101-914 (1988).

19. D. TOOP, *supra* note 6, at 153.

20. Sampling is relatively easy for the average person. All a musician has to do is record into the sampling device an isolated sound from an analog source and then reproduce that sound on his own recording. *See* Dupler *supra* note 4, at 1, col. 3.

21. Soocher, *License to Sample,* Nat'l L.J., Feb. 13, 1989, at 1, col. 2.

tine and widespread use by rappers of myriad samples of varying length in their recordings demands that the legality of the practice be addressed. If sampling is found to violate the Copyright Act, alternatives to ensure the life of this ever-evolving art form must be considered and implemented.

II
Sampling as a Postmodern Art Form

Digital sampling expresses postmodernism today in much the same sense as Andy Warhol's canvases of Campbell's soup cans did in the 1960s. Both methods of artistic expression involve the re-interpretation of previously documented media in a novel setting. The re-use of existing material in a new social, political, and intellectual context is a feature of many forms of postmodern arts practice.[22] For example, a visual artist may attach an old tire to an otherwise one-dimensional painting. Such artistic manipulation has been referred to as "deconstruction" or "recontextualization."[23] This socially poignant process forces the viewer or listener to question and rethink commercial presentation and materialism in society. However, despite the importance of forging new methods of perception and analysis, rap music seems to be a ripe area for indirect censorship through the use of the Copyright Act, perhaps due to the brazen openness of the taking that occurs in some circumstances.[24]

Many pro-artist advocates involved in the ongoing sampling debate feel that all new music comes from old music in some way. They claim that the "American way" is to err on the side of artistic freedom.[25] This premise has been accorded respect in the Anglo-American judicial system by the venerable Justice Story, who stated in *Emerson v. Davies*,[26]

> In truth, in literature, in science and in art, there are and can be few, if any things which, in an abstract sense, are strictly new and original throughout . . . . [E]ven Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.[27]

Justice Story recognized the inevitability of allowing some creative overlap in order to preserve the vitality of some forms of expression.

22. *See* Simpson, *Two Aspects of Sampling in the Music Industry*, 65 AUSTRALIAN L.J. 771, 771 (1989).

23. *Id.* at 771.

24. *See infra* text accompanying notes 100-108.

25. Ken Anderson feels as though the practice should be hailed as artistic expression. *See* Considine & Ressner, *Larcenous Art? Digital Sampling in the Recording Industry*, ROLLING STONE, June 14, 1990, at 103.

26. 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).

27. *Id.* at 619.

Aside from advocating postmodern expression, there is another, perhaps more important, reason for promoting the use of sampling in rap music. Through this medium, many artists pay homage to the strong roots of black American music. "There is a shared black pop classicism in rappers, many of whom look to the late 1960s and early 1970s, particularly to Jimi Hendrix, Parliament-Funkadelic, Sly Stone, Marvin Gaye, James Brown, and Bob Marley for both musical and spiritual inspiration."[28] Rappers are able to affirm and carry on the historical sounds of those artists by weaving them into new arrangements. One commentator argues that it makes sense that during this time of racial embattlement, black musicians are looking back to the civil rights era for musical inspiration.[29] These musicians hark back to a richer, more soulful era.[30]

III
The Copyright Act

A. What Is Protectable?

The basic requirements for copyrightability are set forth in section 102(a) of the Copyright Act:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[31]

As such, the Copyright Act requires originality and fixation in order to obtain a copyright, and specifically denies protection to "idea[s], procedure[s], . . . or discovery."[32]

Authorship under section 102(a) has been defined by courts to describe the "creator of that work."[33] The section further provides that a copyright comes into existence by the affirmative act of the author fixing his or her work in a tangible medium of expression.[34] A work is considered to have been placed in a tangible medium of expression when it "has been placed in a relatively stable and permanent embodiment. In effect it

28. *See A New Bag For Hip-Hop*, New York Newsday, Apr. 19, 1990, Part II, at 11.

29. *Id.* (quoting jazz drummer Max Roach). This can also be seen in rappers' utilization of snippets of speeches by Martin Luther King and Malcolm X. *See* Public Enemy, *Fear of a Black Planet*, Def Jam/Columbia Records, 1990; *see also* Paris, *The Devil Made Me Do It*, Tommy Boy Records, 1990.

30. *See A New Bag For Hip-Hop supra* note 28, at 11. Public Enemy coproducer Keith Shocklee defends sampling old records by arguing that today's musicians cannot play soulfully. *Id.*

31. 17 U.S.C. § 102(a) (1988).

32. *Id.* at § 102(b).

33. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

34. 17 U.S.C. § 102 (a) (1988).

must be recorded or written in some manner."[35] This requirement must be met by the individual author, or by a person authorized by the author.[36]

In order to claim copyright, the author's creation must be an *original* work of authorship.[37] Basically, an original work is one that is not copied from another work.[38] In the aural medium, it has been argued that each person's vocalization of a word, note or creation of another sound is an original expression subject to copyright protection, if duly fixed in a phonorecord.[39] As such, the spectrum of what will be deemed "original" sound is certainly broad, possibly including a single note.[40]

The work seeking copyright must fall under the Copyright Act's definition of a work of authorship. Sound recordings qualify as works of authorship.[41] The standard against which a work shall be judged to be "of authorship" has been referred to as a de minimis one.[42] Nearly all distinguishable variations made from existing works will constitute sufficient indicia of originality for authorship to attach.[43] As such, a sampler may argue that he contributed authorship and thus his contribution should be protected under the Copyright Act.

Courts have cautioned that creative authorship should not be judged by a standard of artistic merit. In *Bleistein v. Donaldson Lithographing Co.*,[44] Justice Holmes stated that judges should not substitute their own views of artistic merit when deciding questions of authorship. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[45]

35. M. LEAFFER, UNDERSTANDING COPYRIGHT LAW 31 (1990).

36. H.R. REP. No. 1476, 94th Cong., 2d Sess. 53 (1976).

37. This standard of originality is not textually apparent in the current statute because the Copyright Act intended to incorporate the standard of originality as established under the 1909 Act. *Id.* at 51.

38. M. LEAFFER, *supra* note 35, at 35.

39. *See generally* Comment, *Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology*, 8 LOY. ENT. L.J. 297 (1988) (authored by J.C. Thom).

40. Professor Nimmer states, "[T]hough the answer is not entirely without doubt, it would seem that any instrumental performance, or vocal rendition, contains something which is irreducible, and thus may be the subject of copyright." 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.10[A], at 2-145, -146 (1989).

41. Works of authorship under 17 U.S.C. § 102(a) include the following: "(1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings." *Id.* This list is not exclusive.

42. M. LEAFFER, *supra* note 35, at 36.

43. *Id.*

44. 188 U.S. 239 (1903).

45. *Id.* at 251.

Provided that they satisfy the above requirements of originality and authorship, sound recordings are copyrightable because they meet the final criteria that requires a work to be fixed in a tangible medium.[46] Since sound recordings must, by definition, be recorded on a tape, disk, phonorecord, or similar object, they meet the tangible medium requirement out of necessity.[47] Only sound recordings fixed in a tangible medium on or after Feb. 15, 1972 are protected by the Copyright Act.[48]

B. Infringement

The traditional test of copyright infringement requires proof of ownership and copying.[49] The determination of ownership includes the issues of originality and copyrightability (*i.e.,* is the work itself copyrightable?). Copying is generally proven by establishing access and substantial similarity between the two works.[50]

A plaintiff can prove access by showing that the defendant had a reasonable opportunity to see or copy the work in question. Access is a question for the jury, with the standard of "reasonable probability."[51]

Substantial similarity refers to the level of similarity between the plaintiff's work and the allegedly infringing work. In order to understand the concept of substantial similarity and its application to digital sampling, the Copyright Act itself must be textually examined.

Infringement, as defined by Congress, results whenever "all or any *substantial portion* of the actual sounds that go to make up a copyrighted recording are reproduced."[52] While substantial similarity is an essential element of a case to prove copying,[53] the actual determination of whether or not a work is substantially similar to a copyrighted work has puzzled many legal scholars. In *Nichols v. Universal Pictures Corp.*,[54] Judge Learned Hand recognized that the line of similarity "wherever drawn will seem arbitrary."[55] The context of sampling appears to afford no further insight into a definition of substantial similarity, particularly due to the computerized alteration and sometimes unrecognizable dissemination of the original work by the sampler.

46. 17 U.S.C. § 102(a).
47. 17 U.S.C. § 101.
48. 17 U.S.C. § 301(c).
49. M. NIMMER, *supra* note 40, § 13.01.
50. *See* LATMAN, GORMAN & GINSBURG, COPYRIGHT FOR THE NINETIES 402 (1989).
51. M. LEAFFER, *supra* note 35, at 266-67.
52. H.R. REP. No. 1476, 94th Cong., 2d Sess. 52 (1976); *see* Note *supra* note 1, at 706.
53. M. NIMMER, *supra* note 40, § 13.03(A).
54. 45 F.2d 119 (2d Cir. 1930).
55. *Id.* at 122.

The issue of substantial similarity raises a number of questions in sound recording cases.[56] Many of these questions were addressed in *United States v. Taxe,*[57] wherein the defendant re-recorded music from records and tapes, adding new sounds and changing speed, reverberation, and volume. The court used the test of substantial similarity to hold that defendant's "piracy" had indeed infringed plaintiff's copyright.[58] However, the court failed to explain how the substantial similarity test should be applied in the sound recording context. As such, there appears to be some degree of confusion in the courts on the issue.[59] A digital sample is almost a per se admission of "similarity" in the sense that it is indeed the actual sound that is being appropriated. Thus, the *Taxe* court would probably leave the question of appropriation to the trier of fact, with the only instruction being to determine whether or not the defendant had indeed utilized the "actual" sound of the plaintiff, as pronounced in section 114(b) of the Copyright Act.[60]

Law review writers have generally argued that digital sampling is directly in violation of section 114(b) of the Copyright Act and therefore should be prohibited.[61] The logic behind these arguments is essentially that section 114(b), by the inclusion of the word "actual," expressly prohibits lifting the exact sound of a copyrighted work.[62]

56. A finding of substantial similarity is merely an evidentiary device to allow an inference of copying. A.B.A., COMMITTEE REPORTS, SECTION OF PATENT, TRADEMARK, AND COPYRIGHT LAW § 306-B-1, at 90:160 [hereinafter ABA COMMITTEE REPORT]; *see* Snowden *supra* note 13, at 61, col. 4. " 'Copyright infringement is a strange area because there's no set amount of timing of music that constitutes a violation,' said Richard Grabel, a New York music attorney and former rock critic. 'The basic legal standard is substantial similarity . . . there's a threshold and if you cross it, bang, you're guilty. If you stay just shy of that threshold, you're using the common language of pop music.' " *Id.*, at 61, col. 4.

57. 540 F.2d 961 (9th Cir. 1976); *cert. denied,* 429 U.S. 1040 (1977).

58. *Id.* at 965.

59. *See generally* Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds,* 87 COLUM. L. REV. 1723 (1987) (authored by Bruce J. McGiverin); *see also* Comment, *supra* note 39. Even Professor Nimmer, in his discussion of the application of the substantial similarity test, does not explain how it should be applied in sound recording cases as opposed to cases dealing with written media. M. NIMMER, *supra* note 39 at § 13.03 (1989).

60. Telephone interview with Ken Anderson, Nov. 10, 1990.

61. *See generally* Note, *The Substantial Similarity Test and its Use in Determining Copyright Infringement Through Digital Sampling,* 16 RUTGERS COMPUTER & TECH. L.J. 509 (1990) (authored by Maura Giannini). *See also* Note, *Digital Sound Sampling Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds, supra* note 59; Comment, *You Can't Always Get What You Want But Digital Sampling Can Get What You Need,* 22 AKRON L. REV. 691 (1989) (authored by Ronald Mark Wells).

62. 17 U.S.C. § 114(b) reads in pertinent part: "The exclusive right of the owner of a copyright in a sound recording . . . is limited to the right to duplicate that sound recording in the form of phonorecords . . . that directly or indirectly capture the *actual* sounds fixed in the recording." (Emphasis added)

Although digital sampling involves taking the exact sound, artists will often filter the sound, scratch it up, or further manipulate the sound until it is no longer recognizable. Also, if one takes into consideration the technological possibilities of digital sampling, there may be instances when there is a quantum of sound so de minimis that it may be taken from a sound recording without violating existing copyright laws.[63] This issue has not been addressed by any court or statute. However, the *Taxe* court surmised in dicta that a trivial re-recording might be such an insubstantial taking that it does not constitute an infringement. It can be inferred from the opinion that the taking of a few notes may be without merit, and thus not necessarily copyrightable.[64]

Finally, there appears to be a dichotomy in section 114 of the Copyright Act between re-recordation, which is protectable, and mere imitation, which is not.[65] Some commentators have argued that digital sampling is more imitative than duplicative because of the fact that samples are generally altered and as such not re-recorded verbatim.[66] It has been further argued that the above distinction reflects the legislative intent that the originality of a recording artist is the main feature to be protected.[67] If it is accepted that sampling is different from mere re-recordation, then it follows that sampling affords the modern musician a valuable tool for artistic expression. Accordingly, sampling is not proscribed under the Copyright Act.[68]

In any event, an important legislative intention is to balance the rights held by the owner of the copyright with the right of the public to enjoy new works.[69] This should logically extend to sound recordings as

63. *See* United States v. Taxe, 540 F.2d 961 (9th Cir. 1976); *cert. denied* 429 U.S. 1040 (1977). One commentator feels that *Taxe*, although holding against record pirates, ruled that the issue of literal copying will not be held to be an automatic infringement because the copying under *Taxe* must be substantially similar to the original recording as a whole. As such, the case can be interpreted as recognizing that certain snippets will be held de minimis. Telephone interview with Ken Anderson, *supra* note 60.

64. *Taxe*, 540 F.2d at 965. "We believe the [jury] instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to consider substantial similarity." *Id.* The fact that defendant in *Taxe* was a seller of pirated records explains why the court did not inquire into whether defendant's works were mere unprotectable imitations because defendant had clearly re-recorded substantially qualitative copyrighted works verbatim.

65. *Id.* at 965 n.2. *See generally* Comment, *Digital Sampling and Signature Sound*, 61 U. MIAMI ENT. & SP. L. REV 71-4 (1989) (authored by Thomas Arn).

66. *See* Comment *supra* note 65, at 71-74.

67. *Id.* at 80.

68. *Id.* at 81.

69. The Copyright Act was framed to "accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies. . . ." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 164 (1975) (citing H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)).

they are defined by the Copyright Act as "works of authorship."[70] As the Supreme Court stated in *Twentieth Century v. Aiken*,[71]

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to serve a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[72]

Thus, recognizing rap sampling as contributing significantly to the public interest, as well as allowing creative expression, should affect the above balance of interests in favor of unrestricted expression.

C. Applying Low Tech Law to High Tech Music

The Supreme Court, in *Sony Corp. of America v. Universal City Studios Inc.*,[73] recognized the inherent interplay between technological advancements and copyright law:

> From its beginning the law of copyright has developed in response to significant changes in technology.[74] [F]or example, the development and marketing of player pianos and perforated rolls of music . . . preceded the enactment of the Copyright Act of 1909; [and] innovations in copying techniques gave rise to the statutory exemption for library copying embodied in section 108 of the 1976 revision of the Copyright Act.[75]

Justice Stevens explains that it was the invention of a new form of copying, the printing press, that gave rise to the original need for copyright protection.[76] "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary."[77] Stevens recognized, however, the inability of the legislature to predict future advancements.

The Copyright Act was first promulgated by Congress in 1909. When enacted, the legislature intended the Act to apply to situations and artistic mediums then in existence that it could adequately address.[78] This inability to foresee future innovations was not without its conse-

70. 17 U.S.C. § 101 (1988).
71. 422 U.S. 151 (1975).
72. *Id.* at 156.
73. 464 U.S. 417 (1984).
74. *Id.* at 430.
75. *Id.* at 430 n.11.
76. *Id.*
77. *Id.* at 430-31.
78. 1 N. HENRY, COPYRIGHT, CONGRESS, AND TECHNOLOGY: THE PUBLIC RECORD. INTRODUCTION xvi (1978).

quences. As technology advanced, many disputes arose, raising questions about the applicability of the Act to novel situations. For example, in a 1968 case, *Fortnightly Corp. v. United Artists Television,*[79] involving the use of alternative cable systems to receive basic television stations in hilly West Virginia,[80] the Supreme Court stated, in reference to the then pertinent Act of 1909:

> Our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in light of drastic technological change.[81]

The Supreme Court recognized in *Fortnightly* that any statutory analysis of a technological advancement would require a consideration of the potential inappropriateness of strict statutory construction.[82]

Similarly, in *Goldstein v. California,*[83] the Court cautioned against statutory analysis that did not adequately address rapid technological change:

> To interpret accurately Congress' intended purpose in passing the 1909 Act and the meaning of the House Report . . . we must remember that our modern technology differs greatly from that which existed in 1909. The Act and the House Report should not be read as if they were written today, for to do so would inevitably distort their intended meaning; rather, we must read them against the background of 1909 in which they were written.[84]

Relaxing the literal terms of the Act in response to technological changes appears to be a necessary step for any judiciary when dealing with a process that could not have been portended by an acting body of law makers. "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of . . . [its] basic purpose."[85] The modern surge in communications and information recordation has produced doctrinal tensions in copyright law that are likely to increase in the near future. Consequently, copyright law is becoming unmanageable for both copyright owners and the public.

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79. 392 U.S. 390 (1968).

80. *Id.* at 391-92.

81. *Id.* at 395-96.

82. *Id.*

83. 412 U.S. 546 (1972).

84. *Id.* at 564. *See also* Jondora Music Publishing Co. v. Melody Recordings Inc., 506 F.2d 392, 397-401 (3rd Cir. 1974) (Gibbons, J., dissenting), *cert. denied,* 421 U.S. 1012 (1975).

85. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). The basic purpose referred to in the case is to "stimulate artistic creativity for general public good." *Id.* This purpose essentially is consistent with the framer's intention to "promote science and the useful arts." U.S. CONST. art. 1, § 8, cl. 8.

Digital sampling is a relatively recent phenomenon, not appearing until several years after the passage of the 1976 revision of the Copyright Act. As explained in Part I, rappers used techniques such as scratching and rapping over copyrighted records long before the advent of digital sampling.[86] Once sampling keyboards were introduced in the early 1980's, it became apparent to many rappers that the keyboards could be used to accelerate the recording process as well as open up whole new avenues of sound.[87] In adopting the machines as part and parcel of their recording process, rappers hardly realized that they were testing the applicability of the Copyright Act to the recently developed digital sampler.

Attorney Ken Anderson feels that there is no such thing as "predictive legislative intent"[88] in the law of copyright. Mr. Anderson believes that new technologies, such as digital sampling, are inapplicable to statutory copyright legislation and should, therefore, be dealt with by other means.[89]

Record producer Arif Mardin states, "You can't stop technology. . . . It moves too fast and the laws don't keep up. Some people still don't understand exactly what sampling is, and maybe new laws will have to wait until there is a greater awareness."[90] Even the American Bar Association Committee on Broadcasting, Recording, and Performing Artists stated that "[t]he lack of case law specifically addressing the issues [of digital sampling] and the increasing use of digital technology in the sound recording industry presents [sic] a situation that would benefit from clarifying legislation."[91]

A clarification in the legislation would update the Copyright Act[92] so that it would apply to digital sampling. However, as it exists today, the Act does not apply to sampling. One commentator suggests, "Sound sampling is the epitome of technology trying to squeeze into copyright law where it just does not fit."[93]

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86. *See supra* notes 6-21 and accompanying text.

87. *See* D. TOOP *supra* note 6, at 156.

88. Telephone interview with Ken Anderson, *supra* note 60.

89. *Id.* Mr. Anderson feels as though some sort of licensing scheme would be the best method of dealing with the myriad conflicts that are arising in this area. See *infra* Part V.

90. Dupler, *supra* note 4, at 74, col. 1.

91. ABA COMMITTEE REPORT, *supra* note 56, at 164.

92. Specifically § 114(b)'s applicability to digital sampling disputes. As the section stands now, it is restrictive, as well as ambiguous, in the use of the word "actual" in relation to what is copyrightable. As explained in the text *infra*, this is due to the inability of the legislature to portend future technological advancements. However, now that sampling has become a major issue, it may benefit from congressional clarification.

93. *Digital Sampling, Cheered, Jeered*, Chicago Tribune, Oct. 23, 1986, Tempo, at 10 (quoting William Krasilovsky, lawyer and co-author of THE BUSINESS OF MUSIC).

As it stands, the practice of sampling has crossed the actionable boundary of the revised Copyright Act and as such must be dealt with either by a clarification in legislation or by some method other than litigation. Eric Greenspan, attorney for many rappers, including Stetsasonic, argues that "[t]he Copyright Act never considered sampling . . . [w]hat we are trying to do is interpret old laws under new circumstances. The problem is that technology is growing faster than lawyers and managers can react."[94]

Thus, if digital sampling cases get as far as a courtroom, it appears inappropriate to apply the current section 114(b) of the Copyright Act. However, as the next Part of this Note details, cases involving sampling are either being settled or not pursued, for a variety of reasons. Thus applicability of the Copyright Act has not been tested in a digital sampling case.

IV
Sampling Cases Are Not Reaching the Courtroom

A. Many in the Recording Industry Are Reluctant to Litigate

Sampled artists and their representatives, usually their publisher or record companies, have been reluctant to bring suits against samplers for a variety of reasons. Record companies that represent sampled artists worry about one day being sued themselves. Attorneys that represent companies and their sampled artists realize that an unfortunate precedent may be set if a court decides to rule either that the taking was de minimis or that it constituted a fair use. If the latter, loss of value to the sampled artist will be difficult to prove.[95] It is likely that a judicial decision in this area would operate in a vacuum, offering no guidelines for artists and their representatives.

In the music world it is increasingly apparent that the axiom "today's plaintiff may be tomorrow's defendant" is a reality for digital samplers. Copyright owners of sound recordings are not claiming their legal remedy against samplers. This phenomenon can be attributed to several factors. A company that itself has artists under contract who sample, aside from the possibility of having to overcome a defense of "unclean hands" in a sampling action, is unlikely to sue another record label whose copyrights it may want to use in the future.[96] This decision not to enforce artist's copyrights based on a large scale corporate financial deci-

94. Considine & Ressner, *supra* note 25, at 103 col. 2.

95. Zimmerman, *Old Is New Again in the World of Sampling*, Variety, Aug. 1st, 1990, at 69, col.3.

96. S. Gordon & C. Sanders, *Roadblocks to Legal Protection in Sampling*, N.Y. L.J., May 19, 1989 at 5, col. 1.

sion may be inherently unfair to the sampled artist. However, in reality, record companies are attempting to be cost effective and are advising against enforcement of rights because they do not wish to be sued by other similarly situated companies.[97]

Attorney Lionel Sobel, editor of *The Entertainment Law Reporter,* believes that companies are motivated to steer clear of actual litigation because they themselves currently have artists under contract who are sampling.[98] Thus, record companies are generally avoiding what would be a rather expensive "vicious circle." Rather than sue each other continually, companies have chosen not to pursue litigation.[99]

A few cases have been brought despite the above considerations. Those cases have settled rather quickly, however. Rappers De La Soul[100] appropriated part of "You Showed Me," a top ten hit by The Turtles in 1969,[101] and used it as a tape loop, replaying segments for more than a minute.[102] Mark Volman, a Turtles vocalist, heard the song as it was reworked into De La Soul's "Transmitting Live From Mars."[103] Volman sued De La Soul and their label, Tommy Boy, for $1.7 million, claiming that the defendants had knowingly used the sample without authorization and thus violated his copyright.[104] The suit was settled immediately for an undisclosed amount.[105]

In other actions, the Beastie Boys and their label Def Jam[106] were sued by artist Jimmy Castor over the alleged use of Castor's material from the mid 1970s. The Beastie Boys, represented by Ken Anderson,

97. *Id.*

98. Tomsho, *supra* note 1, at B4, col. 3.

99. *See* Gordon & Sanders *supra* note 100, at 5, col. 1.

100. The group De La Soul is represented by Tommy Boy Records. The group's "critically acclaimed gold album, *Three Feet High and Rising*, has been hailed as a watershed in the creative use of sampling. The first side alone contained pieces of TV game show themes and the Steely Dan song 'Peg,' James Brown rhythm tracks and hard rock guitar licks, the 'Chopsticks' theme, and what could be the bass line to 'Stand By Me,' along with literally dozens of other snippets that are maddeningly familiar but difficult to identify." *See* Snowden *supra* note 13, at 61, col. 1.

101. *See* Considine & Ressner *supra* note 25, at 103.

102. De La Soul used a four bar section of the Turtles' song (lasting twelve seconds) and "looped" it so that the riff served as the music for the entire 66 seconds of the De La Soul song. *See* Snowden *supra* note 13, at 61, col. 2.

103. The song appeared on De La Soul's album, *Three Feet High and Rising.*

104. Volman, who sued as "Flo and Eddie Inc.," actually used the California equivalent of the Sound Recording Act, which provides that the "author of sound recording has exclusive ownership." CAL. CIV. CODE § 980(a)(2)(West 1989).

105. *See* Tomsho *supra* note 1, at B4, col. 2.

106. Def Jam was Rick Rubin's label which has now split, with Rubin taking the name Def American. The Beastie Boys have since had disagreements with Rubin and signed with Warner Brothers, but the samples in question were contained on *Licensed to Ill*, an album released by Def Jam in 1986. Telephone interview with Jennifer Murillo, assistant publicist at Def American Records, Los Angeles, California, Apr. 26, 1991.

admitted the takings in the action against Castor, as well as in another action, yet both cases were settled well before trial.[107] Mr. Anderson believes that both sides felt the pursuit of the matters in court was the least cost effective alternative the parties faced.[108]

B. Fair Use

In general, a sampler would prefer not to risk a case that would make some uses impossible or increase licensing costs.[109] Under the fair use doctrine,[110] however, he or she may be able to sample without taking these risks. If the doctrine is found applicable by a court, owners of sampled material would lose a large portion of revenue.[111]

Under the fair use doctrine, a fair use of a copyrighted work is permitted without the owner's consent, because the use does not detract from the copyrighted work's value or unfairly compete with that work. The doctrine is flexible and "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that the law was designed to foster."[112] In determining whether the use is fair, courts consider various factors, including those expressly stated in the Copyright Act in section 107.[113]

The first component considered is the purpose and nature of the use. This essentially involves a commercial/noncommercial determination. First, a commercial use negates a finding of fair use, because it will presumptively capitalize on the copyrighted work. Commercial use is not, however, fatal to a fair use defense.[114] Second, courts consider the nature of the disputed work to determine whether the use is creative rather than informative. Third, a court will consider the amount and substantiality of the portion used (sampled, in our case). This test is qualitative as well

107. Soocher, *supra* note 21, at 26 (citing *Castor v. Rubin*, 87 Civ. 6159 and *Thomas v. Diamond*, 87 Civ. 7048 (two Manhattan federal district court cases)).

108. *See* telephone interview with Ken Anderson *supra* note 60, *see also* Zimmerman *supra* note 95, at 69, col. 3-4. "Larry Stanley, director of business affairs at Tommy Boy . . . agrees, saying the whole situation is about negotiation power. 'The plaintiffs are afraid because they could lose their muscle. They can use their copyright for negotiating power and threaten to sue, and they could win a big judgment of treble damages. But the court might say that three or four bars from a song is not enough [to establish infringement]. . . . [The defendant] might take the stance of 'we're only sampling half a bar or three notes, so sue us.' The judge might say that those three notes are enough and then the defendant has no negotiating power.' " *Id.* at 69, col. 3.

109. *See infra* Part V on licensing of samples.

110. 17 U.S.C. § 107 (1988).

111. *See* Zimmerman *supra* note 95, at 69, col. 4.

112. Iowa State Univ. Research Found. v. American Brdcst. Corp., 621 F.2d 57, 60 (2d Cir. 1980).

113. 17 U.S.C. § 107 (1988).

114. M. NIMMER, *supra* note 40, § 13.05[A], at 72-73.

as quantitative.[115] In other words, a sample may be substantial regardless of its length. [116]

Last, and perhaps most applicable to the sampling debate, section 107 calls for courts to consider the likely effect which the use of the copyrighted material will have on the potential market for the copyrighted work.[117] A court will likely consider this to be the most important factor in determining if the use is fair.[118] This factor may serve as a deterrent to litigation because it would be hard for a prospective plaintiff, such as The Turtles, to claim that the value of their original 1969 hit[119] was diminished by the sampler's use of it twenty years later. In fact, the sampler may actually add to the value of the original work because he has exposed it to a wider market, or rekindled interest in it, prompting additional purchases.

The recognition by the Court in *Harper and Row Publishers Inc. v. Nation Enterprises*[120] that the fourth prong will be the most important consideration to users[121] (samplers), does not, by itself, absolve a rapper defendant from satisfying the other factors of a fair use defense.

Authors Lawrence and Timberg, however, in an extensive treatise on fair use,[122] argue that "two of the tests of fair use, the substantiality of the copying, and the commercial/noncommercial dichotomy do not function well for non-literary media."[123] Lawrence and Timber further argue that

> "the fairest and most satisfying approach to the problem [of fair use] is the one inherent in the Copyright Clause of the Constitution[124] which states that the purpose of the copyright law is to 'promote the [P]rogress of [S]cience and the useful [A]rts.' "[125]

115. *See* Latman *supra* note 50, at 37.

116. *Id.*

117. *See* 17 U.S.C. § 107 (1988) (last fair use consideration).

118. "Finally the Act focuses on 'the effect of the use upon the potential market for or value of the copyrighted work.' This last factor is undoubtedly the single most important element of fair use." Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985).

119. Most samples are taken from rock or funk records from the mid '60s to the mid '70s. However, there has been an increasing trend of rappers sampling each other. *See generally* Considine & Ressner *supra* note 25.

120. 471 U.S. 539 (1985).

121. *Id.* at 566.

122. 2 J.S. LAWRENCE & B.TIMBERG, FAIR USE AND FREE INQUIRY (1989).

123. *Id.* at 317.

124. U.S. CONST. art. 1, § 8, cl. 8.

125. 2 LAWRENCE & TIMBERG, *supra* note 122, at 317. The authors explain: "[T]o say that copyright owners are generally entitled to a reward for their labors does not mean that they are entitled to the kind of reward that would frustrate the constitutional purpose to promote the progress of science and the useful arts." *Id.* at 318.

Lawrence and Timberg believe that the test of fair use is faulty. Ideally, it should take into account factors other than the commercial quality of the use.[126] This proposed change favors the sampler by removing the commercial gain factor, which may defeat a fair use defense. Lawrence and Timberg argue that courts, in passing upon particular claims of infringement, must occasionally subordinate the copyright holder's interest in being protected to the greater public interest in "advancement and development of the arts."[127] The authors propose a radical alteration of section 107. The proposed alteration would inquire whether the artist (sampler) is "within a class of persons engaged in the advancement of . . . the arts . . . or ideas deserving first amendment protection,"[128] and balance that concern against the effect on the copyrighted artist's work. Under the proposed test, a court would inquire whether the copier (sampler) stands to substantially profit from the use. If the court decides that there should be some compensation, it will not be in the traditional form of inflated money damages, but rather it will exist as a license, with nominal payment according to the amount of work absconded.[129]

V

Proposal: A Voluntary and Cooperative Scheme for Licensing with Negotiation Guidelines

A. Considerations and Examples of the Sampling Problem

The dilemmas outlined above point to the fact that the music industry must find some method of dealing with the widespread use of digital sampling. The solution will no doubt be found outside the realm of the statutory law as it exists today. Rather, both parties to these disputes, the sampled and the sampler, must come together in a cooperative spirit and resolve these disputes. This will result in a reduction of legal costs for both parties. Also, the animosity that can so easily develop in a context such as digital sampling, due to the appropriation of sound without credit, can be eliminated.

As noted above, one of the crucial elements involved in a fair use analysis is the determination of whether the "infringing" artist stands to profit from the use of a copyrighted work. Commentators[130] are in accord that the determination of profit should be linked to the determination of payment. However, the question of how payment is to be

126. *Id.* at 317.

127. *Id.* at 318; *see also* Berlin v. E.C. Publications Inc., 329 F.2d 541, 544 (2d Cir. 1964).

128. 2 LAWRENCE & TIMBERG, *supra* note 122, at 319.

129. *Id.* at 319. Here Lawrence and Timberg speak of "appropriate" provisions for the payment of copyright royalties.

130. *See, e.g.*, 2 LAWRENCE & TIMBERG *supra* note 122, at 319.

determined is a complex one that signals the starting point of the development of a licensing scheme for digital sampling. As one author states,

> If the use is sufficiently profitable and the copying has been quite substantial, then the copyright owner should in equity be compensated for such use. Admittedly this recommendation will sometimes be difficult to apply: How are reasonable royalties to be determined? When are they to be paid? It is hoped that the procedure for implementing this proposal will not involve legislation or judicial intervention, but will be based on industry-wide negotiations to establish formulas that will not be onerous to the user and will be fair to the copyright owner.[131]

This author shares the view of many pro-artist, fair use defense advocates. A licensing scheme is preferable to litigation and can only be effective if it cooperatively takes into account the basic needs of both parties; the sampled artist's need for compensation and recognition of his or her original creativity[132] as well as the sampler's need for artistic expression at a fair cost. These conflicting interests can be accommodated in the negotiation process. Also, these needs should ideally reflect the founders' goals for copyright law, as set forth in the Constitution, to "promote . . . Science and . . . useful Arts,"[133] while, at the same time, allowing reasonable financial and actual recognition for the original artistic creation of the sampled artist.

Many sampling artists, following the advice of their attorneys, pay flat fees or a percentage of their royalties to the original artists or their labels and publishers. For instance, the New York based rap group Stetsasonic constructed a song in spirited defense of sampling and rap music. The song was woven around music taken from funk artist Lonnie Liston Smith's 1975 piece, "Expansions." Before recording their song, Stetsasonic negotiated with Smith and struck an agreement to pay the sampled artist three thousand dollars for the full ownership of the copyright to "Expansions." Stetsasonic recognized the possibility of some legal wrangling in the future, and therefore obtained permission from Smith to avoid future legal expenses.[134] De La Soul, the defendant in one lawsuit already,[135] decided to avoid legal problems with the '70s funk magnate George Clinton by paying him a flat rate of one cent per album. Clinton is also receiving half of the publishing royalties.[136]

131. *Id.* at 324.

132. For example, the pop rapper Vanilla Ice has recently settled with Rob Parissi, the singer-songwriter behind Wild Cherry. Ice sampled the song "Play That Funky Music White Boy." Parissi is willing to settle, and expressed the non financial desire to receive credit for the sample. San Francisco Chron., Jan. 30, 1991, Datebook, at 1, col. 3.

133. U.S. CONST. art. 1, § 8, cl. 8.

134. *See* Soocher *supra* note 21, at 26.

135. *See supra* Part IV.

136. Newman, *NMS Panel: Legally, There Are No Free Samples,* BILLBOARD, Aug. 12, 1989, at 24.

Ken Anderson, as noted earlier, in his duties as attorney for the Beastie Boys, spent many hours calling artists in order to "clear" the myriad samples that appeared on the 1989 album, *Paul's Boutique.* Mr. Anderson related that most of those samples were cleared for free, including one that was the property of the estate of the Reggae star Bob Marley. Mr. Anderson believes that *most* sampled artists merely want admission of sampling and recognition.[137]

The above examples illustrate that communication with artists and their representatives should be established and that licenses or clearances should be obtained. However, there does not appear to be any industry-wide standard of cooperation. Such cooperation would only exist if every sampler were willing to obtain clearance for all of his recognizable and willful samples, no matter how small.

Perhaps one of the reasons why all members of the industry are not cooperating is the ambiguity in the Copyright Act which causes fear regarding litigation. Attorney Robert Weiner, a copyright lawyer who represents many samplers and sampled artists, said,

> Working out a legal defense for clients concerned about crossing the line of copyright is tricky business. . . . Do I advise them to go to the music publisher or the record company? Most lawyers will tell their clients not to ask for legal permission because if they get turned down and sued then it is intentional infringement.[138]

Similar fear is widespread throughout the industry. However, it can be alleviated by the introduction of a scheme that all members of the industry would be willing to follow. Such a scheme cannot be compulsory, as that would require absolute cooperation of all in the industry,[139] and may need to be statutory in order to be implemented.[140] Rather, the best method in this embryonic and unpredictable era of sampling would be a voluntary scheme, which, if effective over an extended period of time, could then be reported to Congress and the Copyright Office with the goal of possibly amending the Copyright Act to apply to digital sampling.

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137. Telephone interview with Ken Anderson, *supra* note 60.

138. *Lawyers Debate, The Legal Realities of an Emerging New Art Form*, BACK STAGE, Oct. 27, 1989, at 34.

139. 17 U.S.C. § 115 deals with compulsory licenses. Such schemata may prove useful to the sampling context in the future, but an attempt at voluntary licensing seems adequate now. A compulsory system would require the absolute recordation of every sample as well as the intervention of ASCAP and BMI.

140. For example, Ken Anderson cautions against their use in the sampling context because the process is in its implementing stages and therefore rigid compulsory schemata may not be flexible enough for an area that is now far from concrete. Telephone interview with Ken Anderson, *supra* note 60.

In the context of the development of such a voluntary scheme it should be cautioned that U.S. antitrust laws preclude price fixing arrangements.[141] However, price fixing can be avoided by the inclusion of a noncompulsory open schedule of payments, based on the agreement of the parties. The only way in which the industry would face an antitrust violation would be if record companies had a broad "sampling treaty" that provided for a rigid royalty rate schedule.[142]

B. Scheme

The scheme itself involves a process to be undertaken by artists and their managements when the artists wish to engage in sampling. Following the scheme could result in the avoidance of costly litigation or other complications.

Samplers should prepare a list of all of the reasonably recognizable samples that they use on their recordings.[143] Samplers or their representatives should attempt to obtain clearances without payment for all samples listed, as there will be no need to pay for the samples in situations where the sampled artist agrees to the proposed use at no cost. Samplers should then obtain a mechanical licensing agreement for those samples cleared.[144] Samplers and sampled artists should then negotiate payment schedules, specific to each particular situation, and dependent on such factors as the amount of work taken and the realistic expectations of sampled artists regarding compensation.[145] Copyright owners should give all requests reasonable consideration and provide licenses at a fair and reasonable rate.[146] Good faith and fair dealing, as well as respect for the artistic integrity of both the sampled artist and the sampler, should characterize all dealings between the parties. Finally, intra-party determinations should exist to delegate who should bear the cost of the license, the artist, or the record company.[147]

141. *See* Theatre Enter. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Interstate Circuit Inc. v. United States., 306 U.S. 208 (1939).

142. *See* Gordon & Sanders *supra* note 96, at 5, col. 1.

143. Tommy Boy Records routinely asks the artist or producer of a record to list every sample on the record, no matter how obscure or difficult to hear. Then the new record is compared to the source recording in order to determine what needs clearance. Zimmerman, *supra* note 95, at 87.

144. This process may necessarily be part and parcel of the clearance process anyway.

145. For instance, if a record is very old and was never successful, and it is apparent that the artist is simply attempting to capitalize on a potentially favorable situation, this should be taken into account in determining payment.

146. Other authors have proposed such a contingency. *See* Gordon & Sanders *supra* note 96, at 6, col. 3. These authors also point out that all licensing requests should be made in writing. *Id.*

147. "The record companies argue that these payments are in the nature of recording costs and therefore should be paid from the artist's share of the income. The artists argue that this

This scheme should adequately consider the two sets of rights being determined in the sampling context: those of the copyright owner of the master recording and those of the owner of the newly recorded song.

The cost of clearances and licenses will depend on a number of components, such as whether the song is used as a single or as an album track, how important a part the use plays in the new composition, how many times the sample is repeated in the sampler's work, and whether the use is offensive to the holder of the copyright.

Any scheme must also take into account both the American Society of Composers, Authors, and Publishers (ASCAP), and Broadcast Music, Inc. (BMI). The primary objective of these organizations is the protection of the rights of artists, and, as expected, they have both developed digital sampling policies. BMI waits until works are reported to them and then instructs parties how to split royalties.[148] ASCAP takes a different approach. The society regularly tapes radio broadcast performances, which it analyzes in order to credit sampled artists.[149] This method has shortcomings in the rap world because much of rap is not played on the radio, regardless of substantial sales, because of graphic depictions of street life and strong political undertones.

Ideally, under the above outlined scheme, samplers will report all samples to the sampled artists so there will be no need for the sort of policing that ASCAP is currently undertaking. If so, the industry-wide cooperation regarding the above scheme will provide benefits. Following the scheme can result in fair payments and recognition to older sampled artists, as well as avoid possible suits where a "washed up" artist is able to take a huge amount of money from a currently profitable rap band. In other words, the scheme allows the sampled artist to receive a fair payment, while preventing the original artist from walking away with a windfall.

In order to illustrate the probable result of noncooperation, the recent story of the group Milli Vanilli can be examined. The group used an old Blood Sweat and Tears song on their polished 1989 hit "All or Nothing" and refused to give the sampled band credit. While it was recently uncovered that the group did not perform on the entire album, they nevertheless are being sued by the sampled artist as a "party to the fraud"

allows companies to take the risk of not obtaining clearances . . . then in the event that a claim is made, the company simply settles the matter, using the artists' royalties when they accrue." Simpson, *supra* note 22, at 772.

148. For example, De La Soul, after clearing samples with the original writer, tells BMI how to split the royalties. BMI generally has the song's copyright, so if only instrumentals are sampled the original writer may not be needed. *See* Zimmerman *supra* note 95, at 87, col. 2.

149. *Id.*

that denied credit for the sample.[150] Accordingly, samplers should absolutely admit their samples to avoid being sued for fraudulent misrepresentation and copyright violation. Admission and fair negotiations between the parties could lead to the solution of the sampling problem and avoid costly litigation.

VI
Conclusion

Digital sampling is a controversial practice that is incompatible with the Copyright Act. However, the solution to the problem does not lie in litigation. Those that have sued have realized the pitfalls of litigation, which include great cost, unclear applicability of law, and possible defenses (*e.g.*, fair use and contribution of authorship that samplers may utilize effectively). A scheme of licensing based on good faith and fair dealing would solve the problems of both adversaries in the sampling dispute. Sampled artists would get fair financial rewards and recognition, while samplers would have free artistic reign without facing the possibility of a large judgment against them. Industry-wide adherence to a licensing scheme would enable rappers to express their artistic creativity while reflecting musically upon their rich culture.

150. R. Guilliatt, *Illusions and Lawsuits Rock the Video Age*, The Independent, Dec. 9, 1990, at 14.